UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DALMATIA IMPORT GROUP, INC.,

Plaintiff,

v.

FOODMATCH, INC.,

Defendants.

Case No. 16-CV-0933

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

I. Dalmatia Builds Its Business And Innovates The Fig Spread Market In The United States 2

II. Dalmatia's Recipes And Production Processes Are Trade Secrets 2

III. Dalmatia Enters Into A Distribution Agreement With FoodMatch 3

IV. Dalmatia And FoodMatch Enter Into A Non-Disclosure Agreement To Protect Dalmatia's Proprietary Recipes And Production Processes 4

V. FoodMatch Campaigns For Access To Dalmatia's Proprietary Recipes And Production Processes 5

VI. FoodMatch Produces Competing Products Using Dalmatia's Proprietary Recipes And Production Processes 6

VII. FoodMatch's Competing Products And Representations To The Marketplace Are Causing Irreparable Harm To Dalmatia's Business 7

LEGAL STANDARD 8

ARGUMENT 8

I. DALMATIA WILL SUCCEED ON THE MERITS OF ITS CLAIMS AGAINST FOODMATCH 8

A. FoodMatch Is Misappropriating Dalmatia's Trade Secrets Through The Sale Of Its Divina Spreads 8

i. Dalmatia's Recipe And Process For Manufacturing Its Original Fig Spread, Orange Fig Spread And Cherry Spread Are Proprietary Trade Secrets 9

ii. FoodMatch Misappropriated Dalmatia's Trade Secrets In Breach Of The Distribution Agreement And Non-Disclosure Agreement 12

B. FoodMatch Breached The Distribution Agreement And Non-Disclosure Agreement Through Its Sale Of Divina Fig Spread, Orange Fig Spread And Sour Cherry Spread 14

C. FoodMatch Is Engaging In Unfair Competition With Dalmatia Through Its Use Of Dalmatia's Trade Secrets In Order To Convert Dalmatia's Customers To Its Divina Line Of Fruit Spreads 15

II. DALMATIA HAS AND WILL CONTINUE TO BE IRREPARABLY HARMED WITHOUT A PRELIMINARY INJUNCTION 17

III. THE BALANCE OF HARDSHIPS WEIGHS DECIDEDLY IN DALMATIA'S FAVOR 18

IV. A PRELIMINARY INJUNCTION SERVES THE PUBLIC INTEREST 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

AIM Intern. Trading LLC v. Valcucine SpA.,
188 F. Supp. 2d 384 (S.D.N.Y. 2002)....8, 18

Anacomp, Inc. v. Shell Know Servs., Inc.,
Case No. 93-cv-4004, 1994 WL 9681 (S.D.N.Y. Jan. 10, 1994)....9

Bogoni v. Gomez,
840 F. Supp. 2d 694 (S.D.N.Y. 2011)....17, 19

Celsis In Vitro v. CellzDirect, Inc.,
664 F.3d 922 (Fed. Cir. 2012)....20

Computer Assoc. Int'l, Inc. v. Bryan,
784 F.Supp. 982 (E.D.N.Y. 1992)....17

DeWitt Stern Grp., Inc. v. Eisenberg,
Case No. 13-cv-3060, 2013 WL 2420835 (S.D.N.Y. 2013)....17

Eternity Global Master Fund Ltd. v. Mogran Guar. Trust Co. of N.Y.,
375 F.3d 168 (2d Cir. 2004)....15

Golden Krust Patties, Inc. v. Bullock,
957 F. Supp. 2d 186 (E.D.N.Y. 2013)....20

HarperCollins Pubs. L.L.C. v. Gawker Media LLC,
721 F. Supp. 2d 303 (S.D.N.Y. 2010)....8

Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.,
732 S. Supp. 370 (S.D.N.Y. 1989), *aff'd* 920 F.2d 171....10

Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.,
920 F.2d 171 (2d Cir. 1990)....10

KatiRoll Co., Inc. v. Kati Junction, Inc.,
Case No. 14-cv-1750, 2015 WL 5671881 (S.D.N.Y. Sept. 25, 2015)....10, 11

Kewanee Oil Co. v. Bicron Corp.,
416 U.S. 470 (1974)....19

LinkCo, Inc. v. Fujitsu Ltd.,
230 F. Supp. 2d 492 (S.D.N.Y. 2002)....16

N. Atl. Instruments, Inc. v. Haber,
188 F.3d 38 (2d Cir. 1999)....8, 9, 12

Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.,
297 F. Supp. 2d 463 (N.D.N.Y. 2003) *aff'd*, 126 F. App'x 507....15, 16

Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.,
126 F. App'x 507 (2d Cir. 2005)....16

Secured Worldwide LLC v. Kinney,
Case No. 15-cv-1761, 2015 WL 1514738 (S.D.N.Y. Apr. 1, 2014)....8, 18, 19

Shamrock Power Sales, LLC v. Scherer,
Case No. 12-cv-8959, 2015 WL 5730339 (S.D.N.Y. Sept. 30, 2015)....9, 11

Ticor Title Ins. Co. v. Cohen,
173 F.3d 63 (2d Cir. 1999)....17

Velo-Bind, Inc. v. Scheck,
485 F.Supp. 102, 109 (S.D.N.Y. 1979)....18

WPIX, Inc. v. ivi, Inc.,
691 F.3d 275 (2d Cir. 2012)....8, 19

Other Authorities

Federal Rule of Civil Procedure 65....1

Plaintiff Dalmatia Import Group, Inc. ("Plaintiff" or "Dalmatia") submits this memorandum of law in support of its motion by order to show cause (the "Motion"), pursuant to Federal Rule of Civil Procedure 65 for a temporary restraining order and preliminary injunction enjoining Defendant FoodMatch, Inc. ("Defendant" or "FoodMatch") from taking any action to promote, manufacture, or sell Divina brand fig spread, orange fig spread, or sour cherry spread, or any other products derived, in whole or in part, from Dalmatia's proprietary recipes and production processes.[1]

PRELIMINARY STATEMENT

Dalmatia is a specialty food company and the innovator of "fig spread," a food item that is immensely popular with consumers and has won numerous industry awards. Dalmatia has spent years perfecting the recipes and production processes responsible for the unique flavor, texture, consistency and appearance of its signature fruit spreads. Dalmatia's proprietary recipes and production processes are trade secrets, which Dalmatia has always kept secret and confidential, taking substantial measures to safeguard this information.

Dalmatia brings this action against FoodMatch, its former distributor, for stealing Dalmatia's proprietary trade secrets in an attempt to usurp Dalmatia's position in the market. FoodMatch launched a campaign to destroy Dalmatia by stealing and copying Dalmatia's top three best-selling products – "Original Fig Spread," "Orange Fig Spread" and "Sour Cherry Spread" – and promoting and selling its copycat "Divina" fig spread, orange fig spread and sour cherry spreads. To make matters worse, FoodMatch is purposefully targeting Dalmatia's long-time customers and bombarding them with patently false information about Dalmatia discontinuing its brand. Dalmatia's business is in dire jeopardy as a result, and FoodMatch's outrageous and shameful business tactics must be stopped immediately.

---

[1] Filed contemporaneously with this Motion is the complaint in the above-captioned action ("Complaint" or "Compl."), proposed Order to Show Cause, the Affidavit of Maia Magee, sworn on February 5, 2016 ("Magee Aff."), and the Affirmation of Emergency of Rebecca E. Hagenson, sworn to on February 8, 2016 ("Hagenson Aff."). All capitalized terms not defined herein shall have the meaning assigned to them in the Complaint.

STATEMENT OF FACTS

I. Dalmatia Builds Its Business And Innovates The Fig Spread Market In The United States

Plaintiff Dalmatia is a specialty food company co-founded by Neb Chupin ("Mr. Chupin") and Maia Magee ("Ms. Magee") in 1994. (Magee Aff. at ¶ 3.) Dalmatia's three best-selling products are varieties of fruit spreads: (1) Original Fig Spread; (2) Orange Fig Spread; and (3) Sour Cherry Spread. (*Id.*)

When Dalmatia introduced the Original Fig Spread to the United States in late 2000, it was the only fig spread on the market, effectively introducing a new product to the United States. It was an instant success. (Magee Aff. at ¶ 7.) Based on the popularity of the Original Fig Spread, Dalmatia soon expanded its line of spreads to include Orange Fig Spread and Sour Cherry Spread, among others. (*Id.* at ¶ 8.) Developing each of these spreads required many ingredient and process modifications important to reach their respectively unique flavor, texture, consistency and appearance. (*Id.*) Dalmatia's spreads have gained widespread success and acclaim with consumers, and have won numerous industry awards. (*Id.* at ¶ 9.)

II. Dalmatia's Recipes And Production Processes Are Trade Secrets

Dalmatia's spreads' considerable success is attributable to their unique characteristics, which result through a combination of their recipes and production processes. The recipes are expressed in percentages of ingredients, while the production processes consist of preparation, mixing, and cooking, and are captured in confidential flow charts. (Magee Aff. at ¶ 10.)

The Dalmatia Original Fig Spread, Orange Fig Spread and Sour Cherry Spread that are currently on the market reflect Dalmatia's proprietary recipes and production processes, which Dalmatia does not, and never has, made public. To the contrary, Dalmatia has always been diligent in its efforts to maintain the secrecy of its proprietary information. (Magee Aff. at ¶ 11.) Dalmatia only shares its recipes and production processes with third parties with whom Dalmatia has entered into a non-disclosure agreement, and even then, only makes disclosures on a need-to-know basis and designates written disclosures as "confidential." (*Id.*)

III. Dalmatia Enters Into A Distribution Agreement With FoodMatch

In or around spring 2005, Dalmatia sought to expand the brand through widened distribution. (Magee Aff. at ¶ 12.) Dalmatia approached FoodMatch and, on or around December 22, 2006, Dalmatia and FoodMatch entered a "Distribution Agreement." (*Id.* at ¶ 13.) Pursuant to the Distribution Agreement, FoodMatch obtained the exclusive right to distribute Dalmatia's food Products in the United States. (*Id.*)

As part of the Distribution Agreement, FoodMatch agreed not to sell or promote any products similar to Dalmatia's. (Magee Aff. at ¶ 14.) Paragraph 1(c) of the Distribution Agreement provided, in relevant part, that "FoodMatch agrees that during the Term of this Agreement, it will not sell or promote in the Territory any competitive products that are similar to the Products,[2] or that originate or are held out as being from Croatia." (Compl. at ¶ 24.) Similarly, paragraph 1(e) of the Distribution Agreement provided that "FoodMatch agrees that it will not manufacture, purchase, or sell products in the Territory that directly compete with the products." (*Id.*)

---

[2] "Products" is defined as "certain branded food products of Dalmatia," as set forth as an exhibit to the Distribution Agreement. (Complaint at ¶ 24, n. 1).

The Distribution Agreement also contained an intellectual property clause to protect Dalmatia's "proprietary rights used in or by Dalmatia in connection with the manufacture, marketing, sale and distribution of the Products," from any improper or unauthorized use by FoodMatch. (Compl. at ¶ 25; Magee Aff. at ¶ 14.) Specifically, the Distribution Agreement provided that FoodMatch shall not "perform any act which would be inconsistent with any of Dalmatia's Marks or Intellectual Property or Dalmatia's ownership thereof." (Compl. at ¶ 25.)

IV. Dalmatia And FoodMatch Enter Into A Non-Disclosure Agreement To Protect Dalmatia's Proprietary Recipes And Production Processes

In May 2007, FoodMatch sought to have one of its employees tour Dalmatia's United States facility. Concerned that such a tour would result in the disclosure of Dalmatia's proprietary information, Dalmatia proposed, and FoodMatch agreed, to enter into the Non-Disclosure Agreement. The Non-Disclosure Agreement provides explicit protections for Dalmatia's proprietary recipes and production processes. (Magee Aff. at ¶¶ 15-16.) The Non-Disclosure Agreement's "Objective" is clearly defined:

> WHEREAS the Recipient [FoodMatch] shall evaluate and use such information in order to share it with certain Buyers who request and/or require such information in connection with their purchase of the Food Products from the Recipient for resale by the Buyers to consumers . . . .

(Compl. at ¶ 28.) "Information," as defined in the Non-Disclosure Agreement, includes Dalmatia's "information, recipes, ingredients, formula, methods, lists, reports or presentations" relating to Dalmatia's products. (*Id.* at ¶ 29.) FoodMatch also explicitly recognized in the Non-Disclosure Agreement "the value and importance to [Dalmatia] of such proprietary information and the need to keep it strictly confidential." (*Id.* at ¶ 30.)

Paragraph 3 of the Non-Disclosure Agreement limits the use of information disclosed under the agreement: "The Recipient shall use the Information solely in connection with the Objective, and ***for no other purpose whatsoever***." (Compl. at ¶ 31) (emphasis added). With regard to its term, the Non-Disclosure Agreement continues through the term of the Distribution Agreement, and for three years after its expiration. (*Id.* at ¶ 32.)

V. FoodMatch Campaigns For Access To Dalmatia's Proprietary Recipes And Production Processes

After entering into the Non-Disclosure Agreement, FoodMatch sought and obtained access to Dalmatia's confidential and proprietary information. (Magee Aff. at ¶ 17.) Initially, FoodMatch sought direct access to Dalmatia's proprietary information through its production facilities. First, as set forth above, FoodMatch sought access to Dalmatia's United States facility in 2007, prompting the parties to enter into the Non-Disclosure Agreement. (*Id.* at ¶ 15.) Then, in September 2010, two FoodMatch employees visited Dalmatia's European facility and photographed the plant and manufacturing equipment. FoodMatch assured Dalmatia the photographs would be used solely for "educational purposes." (*Id.* at ¶ 26.)

FoodMatch also sought access to Dalmatia's proprietary information under the auspices that it was required by Dalmatia's customers, repeatedly telling Ms. Magee and others at Dalmatia that if Dalmatia did not provide information relating to their recipes and production processes, it would not be able to book new business because such disclosure was the new industry norm. (Magee Aff. at ¶ 17.) FoodMatch obtained Dalmatia's confidential and proprietary recipes and production processes for Original Fig Spread, Orange Fig Spread and Sour Cherry Spread. (*Id.* at ¶ 24.) Dalmatia only provided this information to FoodMatch because it believed that it was necessary for the business, and that Dalmatia was protected by its Distribution Agreement and Non-Disclosure Agreement with FoodMatch. (*Id.* at ¶ 21.) FoodMatch repeatedly assured Dalmatia that these disclosures were necessary for Dalmatia's success, and that FoodMatch was not trying to create their own competing fruit spreads. (*Id.*)

Once it had Dalmatia's recipes and production process flowcharts, FoodMatch had all the information necessary to reproduce its own versions of the Original Fig Spread, Orange Fig Spread and Sour Cherry Spread, which FoodMatch, as Dalmatia's distributor, knew to be Dalmatia's three best-selling products. (Magee Aff. at ¶ 24.)

VI. FoodMatch Produces Competing Products Using Dalmatia's Proprietary Recipes And Production Processes

Pursuant to the terms of the Distribution Agreement, Dalmatia provided notice in early October 2015 that it would be terminating the Distribution Agreement as of December 31, 2015. After closing out the year with FoodMatch, Dalmatia switched to a new distributor in January 2016. (Magee Aff. at ¶ 27.)

From January 17th to 19th, 2016, Dalmatia representatives attended the annual Fancy Food Show in San Francisco, California. (*Id.* at ¶ 28.) The Fancy Food Show is one of the few occasions Dalmatia has to interact directly with its customers, as opposed to through a distributor. (*Id.*) While at the Fancy Food Show, Dalmatia discovered that FoodMatch was marketing its own fruit spreads under the trade name "Divina." (*Id.* at ¶ 29.) FoodMatch's Divina fruit spreads are available in three varieties – fig, orange fig and sour cherry – the same varieties for which FoodMatch obtained Dalmatia's recipes and production processes. (*Id.*)

Dalmatia further learned at the Fancy Food Show that FoodMatch was aggressively, and misleadingly marketing its Divina spreads to Dalmatia's customers, and had been doing so since prior to the December 31, 2015 termination of the Distribution Agreement. (*Id.* at ¶ 30.) Several of Dalmatia's largest customers reported that FoodMatch misrepresented to them that Dalmatia's spreads were discontinued and offered them Divina spreads as replacements. (*Id.*) Other Dalmatia customers informed Dalmatia that FoodMatch provided them with side-by-side taste test comparisons of Dalmatia and Divina samples and, after establishing that they were comparable products, offered the Divina spreads at a significant discount to Dalmatia's price points. (*Id.* at ¶ 31). Yet another customer informed Ms. Magee that it decided to carry a new brand of fig spread (FoodMatch's) that it had tested "several months ago," revealing that FoodMatch developed the Divina spreads while still acting as Dalmatia's distributor, despite the clear prohibition of such conduct in the Distribution Agreement. (*Id.* at ¶ 33.)

Upon conducting taste tests, Dalmatia discovered that the Divina spreads share identical flavor profiles and consistencies with their Dalmatia counterparts, clearly indicating that FoodMatch's Divina spreads are utilizing Dalmatia's recipes and production processes. (Magee Aff. at ¶ 34). In over 15 years of production, no other company had been able to duplicate Dalmatia's fig spread recipes. (*Id.* at ¶ 35). FoodMatch was able to do so within weeks of the termination of the Distribution Agreement.

VII. FoodMatch's Competing Products And Representations To The Marketplace Are Causing Irreparable Harm To Dalmatia's Business

FoodMatch's unauthorized theft of Dalmatia's proprietary recipes and production processes is causing Dalmatia irreparable harm. (Magee Aff. at ¶ 36.) FoodMatch's actions have already resulted in real and tangible harm to Dalmatia's brand and goodwill with long-time customers, who are replacing Dalmatia's products with Divina's copycat spreads. (*Id.* at ¶ 40). By offering its offending products at a substantial discount, FoodMatch has captured shelf-space with Dalmatia's customers, effectively pushing Dalmatia spreads off the shelves of retailers throughout the country. Indeed, FoodMatch has expressed to customers that this is its goal. (*Id.*)

These tactics have been successful, resulting in a dramatic reduction in Dalmatia's sales. Dalmatia projected selling over 11,000 cases, collectively, of Original Fig Spread, Orange Fig Spread and Sour Cherry Spread in January 2016, based on similar sales for the month the past two years. (*Id.*) However, Dalmatia sold only 3,566 cases this January, representing a decline in sales of approximately 68%. (*Id.*) Without intervention, Dalmatia will be out of business in a matter of months.

LEGAL STANDARD

Dalmatia is entitled to a temporary restraining order and a preliminary injunction. A temporary restraining "protect[s] a party from irreparable harm until more lasting relief, such as a preliminary injunction, can be sought." *HarperCollins Pubs. L.L.C. v. Gawker Media LLC*, 721 F. Supp. 2d 303, 305 (S.D.N.Y. 2010) (citing *Am. Broadcasting Cos., Inc. v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977)). "The standard for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Procedure are identical." *AIM Intern. Trading LLC v. Valcucine SpA.*, 188 F. Supp. 2d 384, 386 (S.D.N.Y. 2002).

To prevail on a motion for a preliminary injunction, Dalmatia must establish: (1) a likelihood of success on the merits; (2) that it is likely to suffer irreparable harm absent an injunction; (3) the balance of equities tips in its favor; and (4) an injunction serves the public interest. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278 (2d Cir. 2012); *see also Secured Worldwide LLC v. Kinney*, Case No. 15-cv-1761, 2015 WL 1514738, at *10 (S.D.N.Y. Apr. 1, 2014) (granting preliminary injunction in trade secrets case based on New York law).

ARGUMENT

I. DALMATIA WILL SUCCEED ON THE MERITS OF ITS CLAIMS AGAINST FOODMATCH

A. FoodMatch Is Misappropriating Dalmatia's Trade Secrets Through The Sale Of Its Divina Spreads

"To succeed on a claim for the misappropriation of trade secrets under New York law, a party must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means." *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 43-44 (2d Cir. 1999) (applying New York law). Dalmatia's claim easily meets this standard. First, Dalmatia's proprietary Original Fig Spread, Orange Fig Spread and Sour Cherry Spread recipes and accompanying production processes are protectable trade secrets. Second, FoodMatch misappropriated Dalmatia's trade secrets by creating a copycat line of fruit spreads based on the Original Fig Spread, Orange Fig Spread and Sour Cherry Spread recipes and production processes, in breach of the Distribution Agreement and Non-Disclosure Agreement, and is now exploiting Dalmatia's trade secrets through the sale of the offending Divina fig spread, orange fig spread and sour cherry spread, in many instances to Dalmatia's former customers.

i. Dalmatia's Recipes And Processes For Manufacturing Its Original Fig Spread, Orange Fig Spread And Cherry Spread Are Proprietary Trade Secrets

"A trade secret is any formula, pattern, device or compilation of information which is used in one's business, and which gives the owner an opportunity to obtain an advantage over competitors who do not know or use it." *N. Atl. Instruments*, 188 F.3d at 44 (citations omitted). In determining whether information constitutes a trade secret, New York courts consider the following factors:

> (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 117 (citations omitted). However, "[t]he single most important factor in determining whether particular information is a trade secret is whether the information is secret." *See Shamrock Power Sales, LLC v. Scherer*, Case No. 12-cv-8959, 2015 WL 57303188 F. Supp. 2d 38439, at *25 (S.D.N.Y. Sept. 30, 2015) (citations omitted). To receive protection, "[a]bsolute secrecy . . . is not required." *Anacomp, Inc. v. Shell Know Servs., Inc.*, Case No. 93-cv-4003, 1994 WL 9681, at *9

(S.D.N.Y. Jan. 10, 1994) (citations omitted). "Instead, [t]he rule is only that a substantial element of secrecy must exist and this means so much that except by use of improper means, there would be difficulty in acquiring the information." *Id.* (internal citations omitted).

Dalmatia's widely acclaimed fruit-based spreads are undoubtedly protectable trade secrets. *See, e.g.*, *KatiRoll Co., Inc. v. Kati Junction, Inc.*, Case No. 14-cv-1750, 2015 WL 5671881, at *7 (S.D.N.Y. Sept. 25, 2015) (denying summary judgment when "the uniqueness of the specific ingredient and proportion lists" may constitute trade secrets); *Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 174 (2d Cir. 1990) (noting a "trade secret can exist in a combination of characteristics and components, each of which, by itself is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret"). Dalmatia has spent considerable resources developing and perfecting its recipes and production processes, perfecting them through intensive development, which has resulted in a highly-successful and award-winning line of fruit spreads. *See Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 732 F. Supp. 370, 375-77 (S.D.N.Y. 1989), *aff'd* 920 F.2d 171 (finding trade secret protection because, *inter alia*, "a significant amount of time and money was spent in investigating alternatives that, in the end, were not fruitful."); (Magee Aff. at ¶¶ 6, 9.)

Maintaining the secrecy of Dalmatia's proprietary recipes and production processes is clearly of great value to Dalmatia. The company's sustained success as a profitable business is a direct result of its sale of its Original Fig Spread, Orange Fig Spread and Sour Cherry Spread. (Magee Aff. at ¶¶ 37, 41). Despite providing a list of ingredients on its packaging, no other company has been able to replicate Dalmatia's unique and award-winning characteristics. (*Id.* at ¶ 35.) This is because without the secret recipes, which contain the proportionate percentage of ingredients, and the production process flow charts, it is virtually impossible to replicate the features of Dalmatia's fruit spreads. *See, e.g.*, *KatiRoll*, 2015 WL 5671881 at *7 (noting "mere proportions [can] be trade secrets – even if the entire ingredient list is in the public domain"); (Magee Aff. at ¶ 35.) Indeed, if this information was readily available or easily duplicated, it is unlikely Dalmatia would have maintained its dominance as the leader in the fig spread market for over fifteen years.

Recognizing the critical need for secrecy, Dalmatia uses substantial measures to safeguard this proprietary information. As a small company, co-founders Mr. Chupin and Ms. Magee have continuously maintained tight control over Dalmatia's recipes and production processes, ensuring such information is only shared with their knowledge and on a need-to-know basis. Indeed, Dalmatia has only shared its proprietary trade secrets with parties involved in the manufacture and distribution of its spreads pursuant to explicit contractual protections guarding the secrecy of the information. (Magee Aff. at ¶ 11.) The Distribution Agreement with FoodMatch, for example, contains an intellectual property clause that safeguards Dalmatia's "proprietary rights used in or by Dalmatia in connection with the manufacture, marketing, sale and distribution" of its spreads. (Compl. at ¶ 25 (Distribution Agreement at ¶ 7(a).) Likewise, the Non-Disclosure Agreement was designed to ensure Dalmatia's "information, recipes, ingredients, formula, methods, lists reports or presentations" remained confidential and to delineate the procedure for sharing this information with prospective buyers. (Compl. at ¶ 29 (Non-Disclsoure Agreement at ¶ 1(b), 3).)

Dalmatia made disclosures strictly on a need-to-know basis when FoodMatch sought access to Dalmatia's recipes and production processes. *See Shamrock Power Sales*, 2015 WL 5730339, at *26 (finding a protectable trade secret when plaintiff took "reasonable measures to protect [its] information from dissemination" by, *inter alia*, "sharing it with sales representatives only on a need-to-know basis"). In those instances where Dalmatia disclosed its recipes and production processes with FoodMatch, Dalmatia indicated that the information was confidential. (Magee Aff. at ¶ 11.) Dalmatia has thus made clear the importance of maintaining the confidentiality of its recipes and production processes, and took significant measures to maintain their secrecy. *See, e.g.*, *N. Atl. Instruments*, 188 F.3d at 47 (upholding district court's issuance of preliminary injunction because, *inter alia*, "the record buttresses the Magistrate Judge's determination that North Atlantic made clear the importance of maintaining the confidentiality" of its trade secrets).

ii. FoodMatch Misappropriated Dalmatia's Trade Secrets In Breach Of The Distribution Agreement And Non-Disclosure Agreement

FoodMatch misappropriated Dalmatia's Original Fig Spread, Fig Orange Spread, and Sour Cherry Spread recipes and production processes "in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means" by launching its Divina brand fig spread, orange fig spread, and sour cherry spread in violation of the parties' Distribution Agreement and Non-Disclosure Agreement. *N. Atl. Instruments*, 188 F.3d at 44. First, FoodMatch agreed that during the term of the Distribution Agreement, it would "not sell or promote in the Territory any competitive products that are similar to the Products, or that originate or are held out as being from Croatia." (Compl. at ¶ 24 (Distribution Agreement ¶ 1(c).) Similarly, the FoodMatch agreed in the Distribution Agreement "that it will not manufacture, purchase, or sell products in the Territory that directly compete with the products." (*Id.* (Distribution Agreement at ¶ 1(e).) FoodMatch breached these provisions by promoting the Divina spreads – spreads which undeniably "compete with" and are "similar to" Dalmatia's spreads – and courting Dalmatia's customers during the term of the Distribution Agreement. (Magee Aff. at ¶ 33).

FoodMatch also breached the Distribution Agreement's "Intellectual Property" clause, which protected Dalmatia's "proprietary rights used in or by Dalmatia in connection with the manufacture, marketing, sale and distribution of the Products" from misappropriation by FoodMatch. (Compl. at ¶ 25 (Distribution Agreement at ¶ 7(a).) Specifically, the Distribution Agreement provides that FoodMatch shall not "perform any act which would be inconsistent with any of Dalmatia's Marks or Intellectual Property or Dalmatia's ownership thereof." (*Id.* (Distribution Agreement at ¶ 7(c)).) Launching a line of copycat fruit spreads, which were developed while acting as Dalmatia's distributor, could not be more "inconsistent with Dalmatia's" proprietary rights in the recipes for those fruit spreads. (*See* Magee Aff. at ¶¶ 30-33 (describing instances in which Dalmatia customers were targeted by FoodMatch and provided with misinformation that Dalmatia spreads were being discontinued).)

Additionally, FoodMatch breached and continues to breach the parties' Non-Disclosure Agreement. The Non-Disclosure Agreement specifically protects Dalmatia's "recipe specifics" – including "information, recipes, ingredients, formula, methods, lists, reports, or presentations" relating to Dalmatia's products – and prohibits FoodMatch from disclosing Dalmatia's proprietary information without prior written consent. (Compl. at ¶ 29 (Non-Disclosure Agreement at ¶¶ 1(a), 3).) The Non-Disclosure Agreement only permits FoodMatch to use Dalmatia's confidential information in connection with the "Objective," and "for no other purpose whatsoever." (*Id.* (Non-Disclosure Agreement at ¶ 3).) The "Objective" is clearly defined:

> WHEREAS the Recipient [FoodMatch] shall evaluate and use such information in order to share it with certain Buyers who request and/or require such information in connection with their purchase of the Food Products from the Recipient for resale by the Buyers to consumers.

(*Id.*) Moreover, FoodMatch explicitly recognized "the value and importance to [Dalmatia] of such proprietary information and the need to keep it strictly confidential." (*Id.*) The Non-Disclosure

Agreement also sets a term, remaining in effect "for a period of all times while the Recipient is an authorized distributor of Discloser's Food Products and for three (3) years following the termination of any distributor relationship between the parties." (*Id.* (Non-Disclosure Agreement at ¶ 5(a).)

FoodMatch's use of Dalmatia's proprietary information to develop the Divina spreads is a clear violation of these provisions of the Non-Disclosure Agreement. The parties' distributor relationship was terminated as of December 31, 2015, triggering the Non-Disclosure's three-year term of continued protection. Thus, FoodMatch's promotion and sales of its Divina spreads in January 2016 falls within the term of the Non-Disclosure Agreement.

Further, FoodMatch sought and obtained access to Dalmatia's recipes for its Original Fig Spread, Orange Fig Spread, and Sour Cherry Spread before launching the Divina fig spread, orange fig spread and sour cherry spread. (Magee Aff. at ¶ 17.) It would strain credulity to believe it is mere coincidence that FoodMatch's Divina spreads are only available in those same three varieties – fig, orange fig, and sour cherry. Further, the Divina spreads share identical flavor profiles and consistencies with their Dalmatia counterparts. (Magee Aff. at ¶ 34.) These facts, coupled with the incredibly short time-frame that FoodMatch was able to bring its product to market, leads to the unavoidable conclusion that FoodMatch is misappropriating Dalmatia's proprietary Original Fig Spread, Orange Fig Spread, and Sour Cherry Spread trade secrets in breach of the parties' Non-Disclosure Agreement, and thus establishing the likelihood of success of this claim. (*Id.* at ¶ 35.)

B. FoodMatch Breached The Distribution Agreement And Non-Disclosure Agreement Through Its Sale Of Divina Fig Spread, Orange Fig Spread And Sour Cherry Spread

"To state a claim for breach of contract under New York law, a plaintiff must allege (1) the existence of an agreement; (2) adequate performance of the contract by plaintiff; (3) breach of the agreement by the defendant; and (4) damages." *Eternity Global Master Fund Ltd. v. Mogran Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir. 2004) (citing *Harsco Corp. v. Segui,* 91 F.3d 337, 348 (2d Cir. 1996)). As set forth above, the Distribution Agreement was executed between Dalmatia and FoodMatch on or around December 22, 2006 and the Non-Disclosure Agreement was executed on or around May 14, 2007. Dalmatia performed its duties under the Distribution Agreement by using FoodMatch as its exclusive distributor during the term of the agreement, and performed its duties and obligations under the Non-Disclosure Agreement in disclosing information required by FoodMatch in furtherance of the agreement's objective. (*Id.* at ¶¶ 13, 18.)

As set forth above, FoodMatch breached the Distribution Agreement by developing its competing line of fruit spreads through the misappropriation of Dalmatia's trade secrets during the term of the agreement. Further, FoodMatch breached the Non-Disclosure Agreement by using information disclosed pursuant to the agreement for an improper purpose, namely to develop its copycat Divina spreads. Dalmatia has suffered, and continues to suffer damages resulting from FoodMatch's breaches. As set forth in further detail below (*see supra* at Sec. II), Dalmatia already has suffered injury in damage to its reputation and a 68% reduction in sales, and continues to incur additional business losses with each day that Divina brand spreads remain on the market. There is, therefore, a high likelihood of success on the merits of Dalmatia's breach of contract claims.

C. FoodMatch Is Engaging In Unfair Competition With Dalmatia Through Its Use Of Dalmatia's Trade Secrets In Order To Convert Dalmatia's Customers To Its Divina Line Of Fruit Spreads

Under New York law, "the gravamen of a claim of unfair competition is the bad faith misappropriation of a commercial advantage belonging to another . . . by exploitation of proprietary information or trade secrets." *Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 297 F. Supp. 2d 463, 491 (N.D.N.Y. 2003) *aff'd*, 126 F. App'x 507 (citations omitted). A claim for unfair competition "requires allegations of unfairness and an unjustifiable attempt to profit from another's expenditure of time, labor and talent." *Id.* at 491. Further, an unfair competition claim must also involve "some element of bad faith." *Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 126 F. App'x 507, 509 (2d Cir. 2005) (citing *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1044 (2d Cir. 1980)).

FoodMatch is unfairly competing with Dalmatia through its misappropriation of Dalmatia's trade secrets, deceitful marketing of Divina fig spread, orange fig spread and cherry spread, and by its misleading marketing tactics, largely directed at Dalmatia's customer base.[3] As Dalmatia's exclusive Distributor since 2006, Foodmatch was well aware of the value of Dalmatia's proprietary recipes and production processes. FoodMatch not only knew which products were Dalmatia's best sellers, but also expressly recognized "the value and importance to [Dalmatia] of such proprietary information and the need to keep it strictly confidential" – the very purpose for entering into the Non-Disclosure agreement. The parties explicitly contracted to prevent the realization of the very circumstances now before the Court.

FoodMatch's bad faith is underscored by its strategy of targeting Dalmatia's long-time customers, misleading them into believing Dalmatia's product has been discontinued – knowing this is false – and maintaining aggressively low price points for the stated purpose of undermining Dalmatia's ability to continue to successfully sell its spreads. FoodMatch must be held accountable for its bad faith misappropriation of Dalmatia's labor, skill, name, and reputation.

---

[3] Even if the Court were to find that Dalmatia's proprietary recipes and production processes are not trade secrets – which they are – Dalmatia could nonetheless establish its unfair competition claim. "[T]he doctrine of unfair competition has been applied in various situations . . . where a plaintiff alleges misappropriation of information that does not rise to the level of misappropriation of trade secrets or ideas." *LinkCo, Inc. v. Fujitsu Ltd.*, 230 F. Supp. 2d 492, 501 (S.D.N.Y. 2002).

II. DALMATIA HAS AND WILL CONTINUE TO BE IRREPARABLY HARMED WITHOUT A PRELIMINARY INJUNCTION

"To satisfy the irreparable harm requirement, plaintiff[] must demonstrate that absent a preliminary injunction [it] will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Bogoni v. Gomez*, 840 F. Supp. 2d 694, 701 (S.D.N.Y. 2011) (citations omitted). Dalmatia has already been significantly harmed by FoodMatch's launch of the Divina spreads, through lost customers – representing a 68% decline in business a single month – and incalculable damage to its reputation. *See DeWitt Stern Grp., Inc. v. Eisenberg*, Case No. 13-cv-3060, 2013 WL 2420835, at *4 (S.D.N.Y. 2013) (finding irreparable harm in loss of clients); (Magee Aff. at ¶ 38.). Dalmatia's injuries are far from speculative.

Not only is FoodMatch underselling its spreads to edge Dalmatia out of the market, but it is also misrepresenting to Dalmatia's customers that Dalmatia is discontinuing its own line. *See Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999) (recognizing that "it would be very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come."). The Dalmatia brand is being further harmed through FoodMatch's side-by-side taste comparisons, leading customers to believe that Divina's products are not unique, when, in fact, Divina's spreads are derived entirely from Dalmatia's proprietary recipes and production processes. *See Computer Assoc. Int'l, Inc. v. Bryan*, 784 F.Supp. 982, 986 (E.D.N.Y. 1992) (holding that "the potential loss of an industry leader's present market and loss of the advantage of being the pioneer in the field and the market leader, may constitute irreparable harm").

FoodMatch's targeting and siphoning of Dalmatia's long-time customers is precisely the type of irreparable harm that warrants preliminary relief. For example, in *Velo-Bind, Inc. v.*

Scheck, the court issued a preliminary injunction based on misappropriation of trade secrets and unfair competition, explaining that:

> By siphoning off plaintiff's carefully gleaned customers, defendants subject plaintiff to a definite possibility of irreparable harm, which increases as long as it continues unrestrained. What is at stake here is plaintiff's good will built up over the years, which is not, contrary to defendant's assertion, monetarily ascertainable.

485 F.Supp. 102, 109 (S.D.N.Y. 1979). Like the plaintiffs in *Velo-Bind*, the injury to Dalmatia's business and reputation is not monetarily ascertainable, and is growing by the day. Indeed, Dalmatia's existence as a highly profitable and award-winning specialty food producer depends on immediate injunctive relief from the Court.

III. THE BALANCE OF HARDSHIPS WEIGHS DECIDEDLY IN DALMATIA'S FAVOR

The court must next "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Secured Worldwide*, 2015 WL 1514738 at *21 (citations omitted). Here, the substantial and irreparable harm Dalmatia has suffered and will continue to suffer absent immediate injunctive relief far outweighs any potential harm to Foodmatch, which sells hundreds of other food items. *See* http://www.foodmatch.com/products (FoodMatch website, indicating that FoodMatch's catalogue includes hundreds of items for sale). Dalmatia, on the other hand, only sells a handful of items in the United States, and its viability hinges on the success of its three best-selling products. (Magee Aff. at ¶ 41.) Simply put, the harm FoodMatch would experience in losing the ability to sell three of its hundreds of food items, which have only been on the market for less than a month, pales in comparison to the harm Dalmatia is currently experiencing, whose very existence depends on its ability to effectively sell its Original Fig Spread, Orange Fig Spread and Sour Cherry Spread. *See AIM Intern. Trading*, 188 F. Supp. 2d at 387 (granting temporary restraining order and finding that "the balance of equities tips firmly in plaintiffs' favor if the status quo is not preserved, their business will be wiped out," while defendants would not be damaged).

FoodMatch should not be rewarded for exploiting and misappropriating Dalmatia's proprietary recipes and production processes. *See Secured Worldwide*, 2015 WL 1514738, at *22 ("A defendant's misconduct . . . may tip the balance of equities in favor of an injunction."). FoodMatch's "hardship" corresponds to the loss of sales that it should not have enjoyed in the first place. *See, e.g.*, *WPIX*, 691 F.3d at 287 (explaining that "it is axiomatic that an infringer of copyright cannot complain about the loss of ability to offer its infringing product.") (citations omitted). FoodMatch was on notice that Dalmatia's recipes and production processes are confidential, expressly recognizing "the value and importance to [Dalmatia] of such proprietary information and the need to keep it strictly confidential." All that is required of FoodMatch is that it obey the law, which prohibits the misappropriation of trade secrets, especially when a party has expressly agreed not to do so. Accordingly, the balance of hardships favors Dalmatia.

IV. A PRELIMINARY INJUNCTION SERVES THE PUBLIC INTEREST

Finally, a preliminary injunction serves the public's interest in maintaining a standard of commercial ethics and encouraging commercial innovation. *See Bogoni*, 840 F. Supp. 2d at 702 (explaining the court must determine whether "the public interest would be disserved by the issuance of a preliminary injunction.") (citations omitted); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481-82 (1974) ("The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law."). The incentive for businesses to invest in innovation, which may or may not be protected by other forms of intellectual property law, would certainly be hindered without strict enforcement by courts. *See, e.g.*, *Celsis In Vitro v. CellzDirect, Inc.*, 664 F.3d 922, 932 (Fed. Cir. 2012) (explaining the incentive to invest in innovation "would be adversely affected by taking market benefits away from the patentee and giving them to the accused infringer").

Not only is the public interest served by enforcing Dalmatia's right to protect its proprietary trade secrets, the public interest is further served by preventing FoodMatch from continuing to purposefully cause consumer confusion through its dissemination of misleading information about the future of Dalmatia's spreads and the legitimacy of its own product. *See Golden Krust Patties, Inc. v. Bullock*, 957 F. Supp. 2d 186, 200 (E.D.N.Y. 2013) ("Indeed, given defendants' conduct following the termination of the Agreement – specifically, their continuing to operate with plaintiffs' trademarks and attempting to solicit former Golden Krust customers – there is likely a greater harm to the public in the form of consumer confusion if defendants are not enjoined."). There is simply no public interest that is served by allowing FoodMatch to continue exploiting Dalmatia's proprietary trade secrets.

CONCLUSION

For the foregoing reasons, the Court should issue a temporary restraining order and preliminary injunction.

Dated: New York, New York
February 8, 2016

Respectfully submitted,

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

By: ______________________
Aaron H. Marks
Rebecca E. Hagenson
1633 Broadway
New York, New York 10019
(212) 506-1700
(212) 506-1800 (fax)

Attorneys for Plaintiff Dalmatia Import Group, Inc.